84-1268

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

KFC NATIONAL MANAGEMENT COMPANY - - - - - - - Petitioner

versus

MICHAEL L. BROWN - - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether a United States District Court Judge, can, *sua sponte*, deny the statutory rights of this Petitioner by purporting to "remand" a diversity action to a State Court on the grounds that "Petitioner has not yet been served with an initial pleading" thereby attempting to divest the District Court of jurisdiction, and further limit review, when Petitioner, a nonresident, has been subjected to the judicial machinery of the State Court, by having been served with a State Court Order, and has otherwise strictly complied with the statutory provisions for the removal of cases thus conferring jurisdiction upon the District Court.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No._____

KFC National Management Company - - - - - - - *Petitioner*

v.

Hon. Michael A. Telesca, Judge, United States District Court, Western District of New York - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Second Circuit, entered December 12, 1984, denying any appeal from the order of the District Court and further precluding any review by way of a Writ for Mandamus.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Second Circuit is unreported and is set forth in the Appendix hereto. The Order of the United States District Court for the Western District of New York, at Rochester, remanding the Civil Action styled *KFC National Management Company* v. *Michael L. Brown,* is unreported and is set forth in the Appendix hereto.

JURISDICTION

The Order of the United States Court of Appeals for the Second Circuit was entered December 12, 1984.

The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

United States Code, Title 28:

§ 1441. Actions removable generally

a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

* * *

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond, the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

* * *

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to Section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF THE CASE

On June 25, 1984, the Supreme Court of Monroe County, New York, issued an Order (hereinafter refered to as "State Court Order") which ordered Petitioner to make available to Respondent's attorney "a person whose testimony will bind the Company" and "that person is directed to bring with him or her plaintiff's personnel file . . . along with copies of all employment manuals and personnel rules for hiring and terminating individuals in effect from January 3, 1982 to September 21, 1983."

On July 12, 1984, the State Court Order was filed in the Clerk's Office. It was not until August 6, 1984, however, that the State Court Order was "served" upon Petitioner.[1] The Petitioner, a Delaware Corpor-

[1]The Plaintiff's letter of August 6, 1984, uses the words "*served upon you* herewith is an Order signed by the Hon. Reuben K. Davis commanding you furnish me with certain information . . ." (emphasis added).

ation with its principal place of business in Kentucky, was thereon subjected to the judicial power of the State of New York.

On August 31, 1984, pursuant to and in strict compliance with the provisions of 28 U.S.C. § 1441 and § 1446, the Petitioner filed a Petition for Removal which set forth the jurisdictional requirements in the United States District Court for the Western District of New York, at Rochester, executed a Bond for Removal, and served notice on the Plaintiff below, Index No. 2652/84, and filed a copy of the Petition with the Clerk of the State Court, effecting the removal in the United States District Court for the Western District of New York. The removal was thus effected well within the thirty (30) days required by 28 U.S.C. § 1446(b).

There was no Motion for Remand filed by the Respondent. Nevertheless, on September 26, 1984, the United States District Court for the Western District of New York, *sua sponte,* entered an Order purporting to "remand" the matter back to the State Court. The District Court's Order states "that Petitioner has not yet been served with *an initial pleading* as is contemplated by 28 U.S.C. 1446 and this petition is, therefore, *premature.*" (emphasis added). The last sentence of the District Court's Order states that "the petition for *removal is denied* and this matter is *remanded back* to the Monroe County Supreme Court." (emphasis added).

Thereafter, Petitioner sought an appeal in the United States Court of Appeals for the Second Cir-

cuit. The relief sought by the Petitioner was founded upon the following principles:

1. The Petitioner has the statutory right to seek the protection of the Federal Courts per the Removal Statute, 28 U.S.C. § 1441(a), a right which may not be substantially or procedurally denied the Petitioner when the Petitioner is faced with a State Court Order thereby subjecting Petitioner, a non-resident of that state, to the judicial machinery of that state.

2. The District Court's Order clearly ignored and subverted the purpose of 28 U.S.C. § 1441, *et seq.*, so as to deprive the Petitioner of its statutory rights. The Order was tantamount to a *dismissal,* and thus reviewable, wherein it, first, acknowledged the "action pending" in the New York State Court, then, stated that "an initial pleading as is contemplated by 28 U.S.C. 1446" has not been served, and, finally, purported to "remand" the "matter" back to the State Court when no state court action—filed and of record—pre-existed.

3. The District Court's Order, if not a dismissal, was not issued under the authority of § 1447(c) nor did it invoke the grounds for remand specified therein which would bar review. The Order referred merely to § 1446 and it was therefore *not* immune from review under § 1447(d).

On December 12, 1984, the United States Court of Appeals for the Second Circuit denied any review by appeal or by Writ of Mandamus on the grounds

that the District Court's Order "was clearly based upon grounds specified in 28 U.S.C. § 1447(c)."

The dilemma facing nonresident defendants with respect to the removability of a proceeding in a state with procedures similar to those of New York is exceedingly apparent. Under the peculiar pre-complaint practice of New York, the nonresident defendant, or even the resident defendant faced with an action posing a substantial federal question, will be indefinitely subjected to further state court processes and his or her statutory right of removal indefinitely delayed, despite the existence of grounds for federal court jurisdiction, until such time as the plaintiff should choose to "formally" file an action.

REASONS FOR GRANTING THE WRIT

I.

The District Court's Order Is a Dismissal, Although It Purported to "Remand," Because There Is No State Court Action—Filed and of Record—to Which Petitioner Can be Sent.

There is no prohibition on the Court of Appeals in the review of dismissal orders, as Petitioner believes the District Court's Order was. *See Felton* v. *Walston and Co.*, 508 F. 2d 577, 580 (2d Cir. 1977) (court of appeals reviewed and ultimately reversed dismissal order of district court); *Roberts* v. *American Airlines, Inc.*, 526 F. 2d 757 (7th Cir. 1975) (under 28 U.S.C. § 2106, a court may affirm, modify, vacate, set aside, or

reverse any judgment, decree, order of court properly before it; court reviewed and modified dismissal order).

Petitioner believes that the District Court's Order was a *dismissal,* instead of a remand, because "remand" necessarily presupposes a pre-existing state court proceeding—filed and of record—to which Petitioner can be "sent back." The elementary definition of "remand" appears in *Black's Law Dictionary* 1457 (rev. 4th ed. 1968) with respect to a "cause" as follows:

> The sending back to the same court out of which it came, for purpose of having some action on it there.

The District Court could not have sent the matter at bar back to the New York State Court for the purpose of having any action on it there.

The District Court's Order itself shows its misuse of the term "remand" in light of its internal inconsistency and the circumstances of the matter at bar. The District Court's Order acknowledges the fact that judicial machinery had been exercised against Petitioner wherein it noted the "action pending" in the New York State Court. However, the record shows that no action had been filed or was of record in the State Court; no cause number had been assigned to the matter. The record shows that there was only a utilization by the Respondent of the special New York pre-complaint machinery against Petitioner (which Petitioner will show in Part III of this Petition to be sufficient for removal purposes under 28 U.S.C. §§ 1441,

et seq.). The District Court's Order also appears to acknowledge the lack of a "cause" wherein it erroneously determined that there was no "initial pleading" within the purview of the removal statute. The District Court's Order fails to elaborate on what was meant by its use of the words "initial pleading" or to support its determination with any caselaw to which Petitioner could refer.

The Petitioner, therefore, chose the route of appeal of the District Court's Order based upon its conclusion that:

1. The District Judge must have meant, by the terms "initial pleading," that there was no state court action, filed and of record, because the Order otherwise acknowledged that New York judicial machinery had been exercised against Petitioner; and

2. The District Court's "remand" was therefore a "dismissal" because the District Court could not have "remanded" the matter for the purpose of any court having any action on it, as there was no "cause" on which a state court could act.

The State Court could not have any further action on the matter. The Respondent, in order to pursue utilization of the pre-complaint procedure, must start over again. Knowing all this, the Petitioner saw as its only remedy, an appeal of the purported "remand" as a "dismissal."

In *Amalgamated Workers Union of V.I.* v. *Hess Oil V.I. Corp.*, 478 F. 2d 540 (3rd Cir. 1973), the plaintiffs appealed a district court's order that purported to

"remand." The Third Circuit Court of Appeals held the district court order to be a dismissal. The circuit court set forth the pertinent portion of the district court order as follows:

> Plaintiffs have an administrative remedy in the first instance with the Commissioner of Labor. That department has far greater expertise and personnel available to determine the merits of the claims advanced herein. For that reason, I therefore *remand* this case to the Department of Labor. (478 F. 2d at 542 n.2) (emphasis added).

In reversing the district court order and remanding the case to the district court, the circuit court stated:

> Although the district court memorandum and order are ambiguous, *we interpret its action as a dismissal* of the complaint . . . . In effect, *the decision amounted to a dismissal of the action,* since the remand was to an agency that had no power to provide relief. *The use of the term "remand" was inappropriate* since the case originated in the district court, not in the Department of Labor. *To "remand" a cause is to send it back to the court from which it came.* Black's Law Dictionary 1457 (Revised 4th ed. 1968). *See Northern Pacific Terminal Co.* v. *Lowenberg,* 18 Fed. 339, 341 (Cir. Ct. D. Oregon 1883). (478 F. 2d at 542 n.1) (emphasis added).

It should be noted that the Third Circuit, in *Amalgamated,* cited the same section of *Black's Law Dictionary* as Petitioner cited earlier.

Thus, for there to be a "remand" there must be a pre-existing court action. If by the use of the words

"initial pleading," the District Court meant that there was not a state court action, filed and of record (the only meaning which *could* be given to those words in light of the record of this matter) then there cannot be a "remand." Since the District Court was in error, the Second Circuit Court of Appeals erred in not reversing the Order and remanding this matter to the District Court. The District Court initially had jurisdiction and improperly divested itself of such jurisdiction by erroneously calling its order a "remand."

II.

The District Court's Order, If Not a Dismissal, Was Not Issued Under the Authority of § 1447(c) and Is Therefore Reviewable.

This Court must necessarily address the bar of 28 U.S.C. § 1447(d) to review of remand orders if this Court determines that the District Court's Order was, in fact, a "remand." The bar of § 1447(d) applies *only* to a remand and not a dismissal.

Petitioner is fully aware of the difficult, seemingly insurmountable barrier to review of remand orders created by 28 U.S.C. § 1447(d). This statute, like all statutes, is subject to the interpretation of courts. This Court, in *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336 (1976), determined that § 1447(d) must be read together with § 1447(c) and thereby created an exception to § 1447(d).

Petitioner strongly urges that the circumstances of this case fall within this exception which can be stated thusly: *If* a district court has jurisdiction, and *if* it

issues an order which purports to remand on non-statutory grounds, then there can be appellate review. This Court stated:

> Section 1447(d) is not dispositive of the reviewability of remand orders in and of itself. That section and § 1447(c) must be construed together .... This means that *only remand orders issued under § 1447(c) and invoking the grounds specified therein — that removal was improvident and without jurisdiction — are immune from review* under § 1447(d). (423 U. S. at 346) (emphasis added).

A remand ordered on grounds other than those authorized by § 1447(c) does not divest the federal courts of jurisdiction. This is the case here. The District Court's Order does *not* make specific reference to § 1447(c) or § 1447(d) *nor* uses words indicating that the case was "removed improvidently and without jurisdiction."

The progeny spawned by *Thermtron* further supports the application of its principles to the case at bar. In *Volvo of America Corp.* v. *Schwarzer,* 429 U. S. 1331 (1976), the district court's order stated:

> "It thus appears to a legal certainty that *this Court does not have jurisdiction of this action.* ... Accordingly, since the action could not be maintained in this Court on behalf of the class for which it was brought, it must be remanded. *28 U.S.C. §1447(c).*" (429 U. S. at 1332) (emphasis added).

This Court, in *Volvo,* denied the petitioner's application for a stay, stating:

> [W]hile the District Court may have been wrong in its analysis, it clearly stated, *citing to § 1447(c), that it considered itself without jurisdiction.* The District Court therefore thought it was acting in accordance with § 1447(c), which allows a remand where an action is "removed improvidently and without jurisdiction." (429 U. S. at 1332) (emphasis added).

This Court also stated that *Thermtron* was "of no help to applicant as the remand was explicitly based on an allegedly erroneous finding that the Court 'does not have jurisdiction of this action.' " 429 U. S. at 1333. (citing *Thermtron,* 423 U. S. at 343-44).

The District Court Order now before the Court is distinguishable from the order in *Volvo, supra,* in that it *neither* cites § 1447(c) *nor* makes an explicit finding that the "removal was improvident" or that the district court was "without jurisdiction."

This Court again considered the application of the *Thermtron* principles in *Gravitt* v. *Southwestern Bell Telephone Company,* 430 U. S. 723 (1977). This Court, however, distinguished the remand order in *Gravitt* from the remand order in *Thermtron* where, in *Thermtron,* the district court had remanded "on grounds wholly different from those upon which § 1447(d) permits remand." *Id.* at 723-24. As in *Volvo, supra,* the district court in *Gravitt,* in an opinion more detailed than the one in the case at bar, reasoned that it lacked original diversity jurisdiction and therefore ordered a remand of the case on the grounds that it had been "improperly removed." *Id.* at 723; and *Gravitt* v.

Southwestern Bell Telephone Co., 396 F. Supp. 948 (W. D. Tex. 1975).

The District Court Order now before the Court is distinguishable from the order in *Gravitt, supra,* in that it *neither* appears to base the remand on grounds enumerated in § 1447(c) *nor* use words substantially equivalent to the words therein, i.e., "improperly removed." *See* Appendix 3a.

In *Briscoe* v. *Bell,* 432 U. S. 404 (1977), this Court again addressed the *Thermtron* exception in a footnote, stating:

> Where the order is *based on one of the enumerated grounds,* review is unavailable no matter how plain the legal error in ordering the remand. (432 U. S. at 414 n.13) (emphasis added).

Thus, this Court seems to be saying that in order to apply the § 1447(d) bar to appellate review, there must be either: (a) specific citation to the statute or (b) use of the same or essentially the same words as § 1447(c).

This Court denied certiorari to consider the review of a remand order in *Sheet Metal Workers' International Assn., AFL-CIO* v. *Carter,* 450 U. S. 949 (1981). In *Carter,* the district court had remanded the case, after judgment, on grounds that it *lacked jurisdiction.* 450 U. S. at 950. The court of appeals acknowledged that the remand order itself "was entered on grounds specified in [§ 1447(c)]," but vacated the order because it occurred *after* judgment while § 1447(c) speaks to "anytime *before* final judgment . . . ." *See In re Carter,* 618 F. 2d 1093, 1105 (5th Cir. 1980) (emphasis added).

Despite the dissent filed by Justice Rehnquist in *Carter*,[2] it appears that certiorari was denied where the court of appeals found that the remand order was simply *not permitted* by § 1447(c), i.e., remand must be *before* as opposed to after judgment. The situation in *Carter*, however, is not the situation posed in the case at bar because there is no question whether the purported remand was ordered before judgment, but only a question as to the proper *grounds* upon which the purported remand before judgment was ordered.

The precedent established by this Court in review of remand orders before judgment has demonstrated that the order must either: (a) make specific reference in the remand order to 28 U.S.C. § 1447(c), or (b) use the same or essentially the same wording as § 1447(c) either in the specific order or, at the minimum, in the opinion preceding the order. The District Court's Order, void of any preceding opinion, met neither of these requirements where it was neither: (a) a statement citing § 1447(c) or § 1447(d), nor (b) a use of the same or essentially the same wording as § 1447(c). In such a case, appellate review of the error of law committed is not barred under § 1447(d) as interpreted by the *Thermtron* case and its progeny.

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[2]Justice Rehnquist believed that the district court's "remand order was entered on grounds permitted by the statute," stating:

> In *Thermtron*, . . . the Court stated that "[i]f a trial judge purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise." [citing 423 U. S. at 343]. The District Court remanded this case precisely for the quoted reason. (450 U. S. at 951).

III.

The Decision of the Court of Appeals Conclusively Deprived the Petitioner of Any Remedy Whatsoever and Sanctions a Departure by the District Court From the Accepted and Usual Course of Removal Under 28 U.S.C. §§ 1441, *et seq.*, thereby Depriving Petitioner of Its Statutory Rights.

The Court of Appeals sanctioned a departure by the District Court from the accepted and usual course of removal under 28 U.S.C. §§ 1441, *et seq.*, with respect to what constitutes an "initial pleading" for removal purposes.

When faced with the State Court Order, Petitioner was subjected to the judicial machinery of the State of New York, and as a nonresident, sought the protection of the federal courts through the removal statutes, 28 U.S.C. §§ 1441, *et seq.*

Title 28, United States Code, Section 1441(a) states, in relevant part:

> [A]ny *civil action brought* in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. (emphasis added.)

Title 28, United States Code, Section 1446(b) states, in relevant part:

> The petition for removal of a civil action or proceeding shall be filed within thirty days after

> the receipt by the defendant, through service or otherwise, of a copy of the *initial pleading* . . . . (emphasis added.)

The letter of August 6, 1984, from the attorney for the Respondent (Appendix, p. 9a) recites that the State Court Order enclosed therewith was being "served" upon Petitioner. *See Perimeter Lighting, Inc.* v. *Karlton,* 456 F. Supp. 355, 359 (N.D. Ga. 1978) ("receipt" of "initial pleading" controls removability). The Petition for Removal (Appendix, p. 6a) was timely filed under 28 U.S.C. § 1446(b) and with respect to this there has been no dispute.

The resultant question, then, is whether the State Court Order constituted a "civil action brought in a State Court" under § 1441(a) and was "an initial pleading" under § 1446(b).

The question of what constitutes a "civil action brought in a State court" was addressed in *Commissioners of Road Improvement District No. 2* v. *St. Louis Southwestern Ry. Co.,* 257 U. S. 547 (1922). In *Commissioners,* this Court found that a proceeding in a state county court to access benefits and damages growing out of road improvements was properly removable to the federal district court. This Court noted that the proceedings in *Commissioners* were governed by a state statute prompting a distinction between "a proceeding which is the exercise of legislative power and of administrative character and a judicial suit." 257 U. S. at 554. This Court determined that when the character of a proceeding before a tribunal has all the elements of a judicial controversy, the tribunal is functioning as a

constitutional court regardless of the fact that the Supreme Court of the State has found otherwise, and even if such proceedings could not have originally been commenced in a federal court. 257 U. S. at 557. This Court stated:

> The question for removal under the federal statute is one for the consideration of the federal court. It is not concluded by the view of a state court as to what is a suit within the statute. (257 U. S. at 557-58).

The main likeness of the facts in the case at bar to those in *Commissioners* is that the proceedings in either case did not involve the filing of a formal complaint and were not ones which could be commenced in the federal district court. In the case at bar, the judicial machinery of the state of New York was invoked prior to the filing of a formal complaint, as allowed by the law of New York in a pre-complaint discovery proceeding, and as a result Petitioner was compelled to appear before New York courts to defend the claims of the Respondent in such proceedings.

In *Commissioners,* this Court noted the limitation on removal of cases within the original jurisdiction of the federal court and stated:

> This limitation is not intended to exclude from the right of removal defendants in cases in the state court which, *because of their peculiar form would be awkward as an original suit in a federal court, or would require therein a reframing of the complaint and different procedure.* [citations omitted]. The limitation is that only those pro-

> ceedings can be removed which have the same essentials as original suits permissible in District Courts; *that is that they can be readily assimilated to suits at common law or equity, and that there must be diverse citizenship of the parties and the requisite pecuniary amount involved.* 257 U.S. at 561.

In the case at bar, the proceeding in the New York State Court *can* be readily assimilated to a "suit" wherein state court processes have been set in action against Petitioner and, by these processes, Petitioner is compelled to gather the information to defend, in the pre-complaint proceeding, the presupposed claims set out by the Respondent. *See* the Affidavit accompanying the State Court Order, Appendix, pp. 10a-11a.

Furthermore, Petitioner clearly set forth the grounds for original diversity jurisdiction of the District Court in its Petition for Removal which were not contested by the Respondent. The Respondent, having failed to raise any issue of improper removal, therefore waived any defect in removal. *Medlin* v. *Boeing Vertol Co.,* 620 F. 2d 954, 960 (3rd Cir. 1980). There is no question that the District Court properly had jurisdiction of this case upon removal. The District Court, *sua sponte,* erroneously attempted to divest itself of jurisdiction upon the technical formality of a lack of an "initial pleading" in the State Court without conducting an inquiry into the court's subject matter jurisdiction, i.e., the alleged amount in controversy and the diverse citizenship of the parties. *See*

Medlin, supra, 620 F. 2d at 960 (court has responsibility to inquire into subject matter jurisdiction).

The question of what constitutes an "initial pleading" was most clearly addressed in *Perimeter Lighting, Inc.* v. *Karlton,* 456 F. Supp. 355, 357 (N.D. Ga. 1978). In *Perimeter Lighting,* a state court had issued an order enjoining the non-resident defendant from certain acts but "the complaint had not been filed with the clerk of the Rockdale County Superior Court." The federal district court denied a motion to remand the case for lack of jurisdiction even though the defendant filed the petition for removal prior to the plaintiff's filing of a complaint. The court held that the defendant's receipt of a copy of the pending complaint at a hearing on the injunction constituted receipt of an "initial pleading." The court discussed the definition of an "initial pleading" as follows:

> Section (b) states that a case may be removed after the defendant receives the "initial pleading" of the plaintiff "through service or otherwise." By its own terms, then, the statute does not require an action to be filed before a petition for removal will be entertained. All that is required is receipt of the "initial pleading." [footnote omitted]. An initial pleading must constitute a clear statement of the case which will allow the defendant to examine the basis for the action. *In particular, the initial pleading must be such that the defendant can intelligently ascertain removability from its face.* (456 F. Supp. at 358) (emphasis added).

The court, thus, did not confine the definition of an "initial pleading" to a complaint and noted other cases which held other items to constitute an initial pleading. 456 F. Supp. at 358, 358 n.2; *See Campbell* v. *Associated Press,* 223 F. Supp. 151 (E.D. Pa. 1963) (draft complaint); *Lummus Co.* v. *Commonwealth Oil Refining Co.,* 195 F. Supp. 47 (S.D. N.Y. 1961) (notice of motion to compel arbitration accompanied by petition to compel filed with Secretary of State).

In the case at bar, Petitioner (Defendant below) *could and did* intelligently ascertain the removability of the case from the face of the State Court Order with respect to the original jurisdiction of the federal court under 28 U.S.C. § 1332. It was never controverted below that the sole Plaintiff in the proceeding below, the Respondent herein, is a domicilary of New York and that the sole Defendant, the Petitioner herein, is a citizen of Delaware, the state of its incorporation, and of Kentucky, the state where it has its principal place of business, such that diversity exists. The Petitioner could, as well, intelligently ascertain from the State Court Order that the Respondent was seeking discovery of information for a pending complaint for wrongful termination of employment and from such the Petitioner could reasonably ascertain that recovery would not be below the jurisdictional amount of $10,000. The Petitioner clearly and properly set forth these jurisdictional grounds in its Petition for Removal and such grounds were not controverted by the Respondent and no Motion to Remand was made.

The court in *Perimeter Lighting* made the following statement with respect to the removal of cases prior to the filing of the complaint which contains especial relevance to the case at bar:

> [T]he state court had taken action in a case not yet of record. To deny defendant's right to remove in such a situation would allow plaintiff to effectively block defendant's right to remove until such time as plaintiff sees fit to file a complaint. Such a holding would work to defeat the removal statute's purpose and allow a plaintiff to keep an action otherwise removable, in the state court even after the state court had exercised its power by enjoining the defendant. (456 F. Supp. at 359).

This rationale, and the voicing by the federal courts of the right of a nonresident defendant to seek the protection of the federal courts and to remove an action once it had beeen subjected to the power of a state court by receiving an order, was echoed in the case of *Love* v. *State Farm Mutual Auto Ins. Co.,* 542 F. Supp. 65 (N.D. Ga. 1982) . In *Love,* the court went through an extensive review of the 1948 revision by Congress to 28 U.S.C. § 1446(b). Although the court was concerned with the "through service or otherwise" language of 28 U.S.C. § 1446(b), what is important to the case at bar is the reference to New York State practice and the recognition of the problems presented to removal defendants by such practice. The court stated:

> Prior to 1948, a removal petition was in essence a state court responsive pleading; it was filed in

that court within the time permitted to answer a complaint as established by the state's rules of civil practice. In 1948, in an attempt to make the removal procedure more uniform, Congress revised section 1446(b) to provide that the removal petition be filed in federal court "within twenty [now thirty] days after commencement of the action or service of process, whichever is later." 62 Stat. 939 (1948). Under this formulation, of course, the removal period could not begin until service of process had been obtained. *A problem arose, however, in those states such as New York which permitted a plaintiff to commence a suit without serving or filing a complaint,* merely by serving the defendant with a summons. Under the 1948 version of section 1446(b), *in such cases the removal period could expire before a defendant received a copy of the complaint, thus depriving him of an opportunity to remove the action. It was in response to this problem that Congress revised section 1446(b) to permit removal "within twenty [now thirty] days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading."* See H. R. Rep. No. 352, 81st Cong., 1st Sess., reprinted in [1949] U. S. Code Cong. Serv. 1254, 1268. *Thus, the "through service or otherwise" language was intended to expand the removal period in states following the New York Rule.* [citation omitted]. *It was not intended to diminish the right to removal, by permitting a plaintiff to circumvent the already existing requirement of personal service through informal service.* The Court concludes that the removal period set forth in 28 U.S.C. § 1446(b) cannot commence until a plaintiff properly serves

> defendant with process. (542 F. Supp. at 67-68) (emphasis added).

See also Skinner v. *Old Southern Life Ins. Co.*, 572 F. Supp. 811, 813 (W. D. La. 1983) (characterizing the above quoted language as "very clear and succinct").

This principle—of the right of removal being triggered by the non-resident defendant's receipt of a State Court Order—is so elementary that it has even been accorded a reference in *American Jurisprudence:*

> § 2415. Requirement that action be "brought".
>
> Before an action can be removed from a state to a federal court, it must have been "brought" in the state court within the meaning of the removal statute. Whatever the form of proceeding used to bring a defendant into a particular state court, *a suit is considered "brought" for removal purposes when that defendant is subjected to judicial orders. In other words, if the judicial machinery of a state has been set in motion against a defendant a suit has been brought* and—assuming all other prerequisites for removal have been met—may be removed. [Emphasis added, 32B Am. Jur. 2d *Federal Practice and Procedure* § 2415 (1982).]

In comparing the above cited cases to the case at bar, the following points must be noted:

1. *All* the cases cited above were decided *after* a motion for remand had been filed by the Plaintiff-Respondent. *Here,* there was no Motion for Remand.

2. *All* of the district courts denied the motion for remand and retained jurisdiction. *Here,* the District Court Judge, *sua sponte,* divested the district court of jurisdiction.

3. The reference by the district courts to case law and to extensive legislative history implies that the parties had been afforded the opportunity to brief the issues prior to the court's decision. *Here,* there was no briefing opportunity.

4. The refusal to *maintain* jurisdiction was not done on the Court's own initiative in any of the cited cases. *Here,* the District Court purported to "remand," and, in effect, *dismissed* the case on its own initiative when, from a review of the caselaw, the conclusion is inescapable that the State Court Order was "an initial pleading" under 28 U.S.C. § 1446(b). This action of the District Court constituted an abuse of discretion.

Residents of the State of New York can do to each other whatever they choose and whatever is authorized by that state's "Civil Practice Law and Rules." A nonresident, such as Petitioner, however, is entitled to seek the protection of the federal courts whenever the power of the State of New York is brought against it. The State Court Order, the subject of Petitioner's Petition for Removal, was an instrument which subjected Petitioner to the judicial machinery and enforcement mechanism of the State of New York.

This Court has long been assertive in allowing a non-resident defendant to seek the protection of the federal courts whenever state action is exercised against that defendant. *Commissioners of Road Improvement District No. 2* v. *St. Louis Southwestern Ry. Co.,* 257 U. S. 547 (1922). The Court of Appeals decision affirming the District Court Order has indefinitely denied

Petitioner, a non-resident, access to the federal courts thereby subjecting Petitioner to the peculiarities of New York State practice, effecting an abrogation of the purpose of 28 U.S.C. §§ 1441, *et seq.*, and conclusively depriving the Petitioner of any remedy whatsoever.

CONCLUSION

Here, where there has clearly been:

1. An error of law committed and a failure to recognize the propriety of federal jurisdiction;

2. A result in which the District Court Judge has improperly sought to divest the District Court of jurisdiction; and

3. A failure to cite § 1447(c) or use the same or essentially the same words as § 1447(c), then,

§ 1447(c) is not a bar to review and a Writ of Certiorari should issue to review the Order and Judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

STEPHEN B. EARLY
KFC NATIONAL MANAGEMENT COMPANY
1441 Gardiner Lane
Louisville, Kentucky 40213
Telephone: (502) 456-8335

Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 84-7823

KFC NATIONAL MANAGEMENT COMPANY, - - - - - *Petitioner-Appellant,*

against

MICHAEL L. BROWN, - - - *Respondent-Appellee.*

ORDER—Filed December 12, 1984

Before FEINBERG, KAUFMAN, and ROSENN,* Circuit Judges.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the appeal from the judgment of said district court is dismissed.

1. Since the district court's September 26, 1984 order denying appellant's petition for removal and remanding this case back to the Monroe County Supreme Court was clearly based upon grounds specified in 28 U.S.C. § 1447(c), we conclude that § 1447(d) bars any appeal from that order. While appellant has not petitioned this court for a writ of mandamus, we find that for the same reason review

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*Honorable Max Rosenn, Senior Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

by way of such a petition would be barred here, as well. See Thermatron (sic) Products, Inc. v. Hermansdorfer, 423 U. S. 336, 351-52 (1976).

2. Appellee's motion for damages pursuant to F.R.A.P. 38 is denied. Appellee should, however, receive the usual costs.

(s) Wilfred Feinberg
Chief Judge

(s) Irving R. Kaufman,

(s) Max Rosenn,
Circuit Judges.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK
ROCHESTER

Civil Action No. 84-0996T

KFC NATIONAL MANAGEMENT COMPANY, - - *Petitioner,*

v.

MICHAEL L. BROWN, - - - - - *Respondent.*

ORDER

Petitioner has asked this Court to remove an action pending in the New York State Supreme Court for the County of Monroe entitled *Michael L. Brown* v. *Kentucky Fried Chicken,* Index No. 2652/84. My review of the Petition and the exhibits submitted revealed that Petitioner has not yet been served with an initial pleading as is contemplated by 28 U.S.C. 1446 and this petition is, therefore, premature. Accordingly, the petition for removal is denied and this matter is remanded back to the Monroe County Supreme Court.

ALL OF THE ABOVE IS SO ORDERED.

(s) Michael A. Telesca
United States District Judge

Dated: Rochester, New York, Sept. 26, 1984.

[LETTERHEAD OF UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK]

Reply To:

(X) 604 U.S. Courthouse
68 Court Street
Buffalo, N.Y. 14202

( ) 282 U.S. Courthouse
100 State Street
Rochester, N.Y. 14614

August 31, 1984

Stephen B. Early, Vice President
and General Counsel
KFC National Management Company
P. O. Box 32070
Louisville, KY 40232

RE: KFC National Management Co. v. Michael L. Brown
CIV 84-996T

Dear Mr. Early:

This transmittal is to inform you that we have received and filed in our Court on this day, August 31, 1984, an original Bond for Removal; Petition for Removal; Affidavit of Filing a Petition and the civil cover sheet. Enclosed please find your receipt for same.

Your case has been assigned to Judge Michael A. Telesca of the Rochester Court and the case number is CIV 84-996T. Please refer to this number on all documents and correspondence.

For your due consideration, I am enclosing a copy of our local rules. Please note Rule 13, which sets forth the proper form for filing papers and Rule 4 which requires that an attorney who does not have an office in the Western

District of New York shall specify in writing an attorney of this court upon whom service of papers shall be made.

If you require additional information, please call.

Very truly yours,

(s) Linda M. Kern
Deputy Clerk

lmk

Enclosure

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

No. _____

KFC NATIONAL MANAGEMENT COMPANY, - *Petitioner,*

v.

MICHAEL L. BROWN - - - - - *Respondent*

PETITION FOR REMOVAL

To the Judges of the United States District Court for the Western District of New York:

The Petition of KFC National Management Company respectfully shows:

1. On or about the 21st day of May, 1984, an action was commenced against Petitioner in the Supreme Court of the State of New York in and for the County of Monroe, entitled Michael L. Brown, Petitioner, against Kentucky Fried Chicken, Respondent, Index No. 2652/84, by the service upon Petitioner's Rochester, New York office of a Notice of Motion.

2. The above described action is one of which this court has original jurisdiction under the provisions of Title 28, United States Code, Section 1332, and is one which may be removed to this court by the Petitioner, Respondent therein, pursuant to the provisions of Title 28, United States Code, Section 1441, in that it is a civil action wherein the matter in controversy will exceed the sum or value of $10,000 exclusive of interest and costs, and is between citizens of different states. The Petitioner (Respondent herein) Michael L. Brown

at the time this action was commenced was and still is a citizen of the State of New York; and the Respondent (Petitioner herein) KFC National Management Company at the time this action was commenced was and still is a corporation incorporated under the laws of the State of Delaware, with its principal place of business in the State of Kentucky, and was not and is not a citizen of the State of New York, wherein this action was brought.

3. Petitioner files herewith a bond with good and sufficient surety conditioned, as provided by Title 28, United States Code, Section 1446(d), that it will pay all costs and disbursements incurred by reason of the removal proceedings hereby brought should it be determined that this action is not removable or is improperly removed.

WHEREFORE, Petitioner prays that the above action now pending against it in the Supreme Court of New York in and for the County of Monroe, be removed therefrom to this Court.

Respectfully submitted,

(s) Stephen B. Early
General Counsel for Petitioner
KFC National Management Company
P. O. Box 32070
Louisville, Kentucky 40232
(502) 456-8335

VERIFICATION

COMMONWEALTH OF KENTUCKY
COUNTY OF JEFFERSON } ss.:

Stephen B. Early, being duly sworn, deposes and says that he is a Vice President of KFC National Management Company, Petitioner herein; and that he has read the foregoing Petition for Removal and knows the contents thereof and that the same are true of his own knowledge.

(s) Stephen B. Early, Vice President

SUBSCRIBED AND SWORN to before me this 28th day of August, 1984.

(s) Nancy W. Cope
Notary Public
State at Large

My Commission Expires August 12, 1987

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Removal was mailed, postage pre-paid, to Alfred P. Kremer, Counsel for Respondent, this 28th day of August, 1984.

(s) Stephen B. Early
Counsel for Petitioner

(SEAL)

[LETTERHEAD OF ALFRED P. KREMER]
August 6, 1984

Mr. Dennis Knatzen
Kentucky Fried Chicken
2973 West Henrietta Road
Rochester, New York 14620

Dear Mr. Knatzen:

Served upon you herewith is an order signed by the Hon. Reuben K. Davis commanding that you furnish me with certain information pertaining to Michael L. Brown.

This order was obtained upon your prior default.

You have thirty (30) days from the date this order is served upon you to reply to it.

Very truly yours,
(s) Alfred P. Kremer

Enclosure

STATE OF NEW YORK SUPREME COURT

COUNTY OF MONROE

Index No. _____

MICHAEL L. BROWN - - - - - *Petitioner*

v.

KENTUCKY FRIED CHICKEN - - - *Respondent*

AFFIDAVIT

MICHAEL L. BROWN, being duly sworn deposes and says:

1. He is the petitioner herein.

2. From January 3, 1982 to September 21, 1983 your deponent was employed by the respondent.

3. Your deponent consulted his attorney and was advised that in order to determine whether or not your deponent had a cause of action against the respondent that your deponent's attorney would have to have copies of all employment contracts, rules and regulations pertaining to employment and termination of employment which were in effect during the period of time that your petitioner worked for respondent.

4. Specifically, your petitioner was advised that he would need your deponent's employment file containing among other things your deponent's application blank, work record and reasons for termination, any separate record kept outside of your deponent's personnel file pertaining to his termination such as the company's internal memoranda dealing with how to answer the inquiry by the New York State Department of Labor pertaining to your deponent's unemployment insurance, copies of all personnel manuals and rules and regulations pertaining to the hiring and firing of persons such as your deponent which were in effect during the terms of your deponent's employment. Your deponent was advised that without these your deponent's attorney would not be able to proceed his investigation.

5. Additionally, your deponent believes that he has been fired for improper motives over and above any other consideration as to whether or not he had a contract of employment with Kentucky Fried Chicken. Your deponent wishes to have respondent examined under oath and more particularly Dennis Knatzon with respect to the procedures that he used to terminate your deponent.

6. On January 11, 1984, your deponent's attorney sent Mr. Knatzon a letter, a copy of which is annexed hereto as exhibit A. No rely to this letter has been received by your deponent's attorney and your deponent believes that respondent has no intention of answering the letter.

7. It is your deponent's contention that he will be unable to prepare a complaint without these materials.

8. The materials are all readily available to respondent and respondent should have no problem in furnishing them to your deponent's attorney.

9. Indeed, with the soaring costs of litigation, respondent should welcome the opportunity to furnish these items to your deponent's attorney. If respondents have done no wrong it will be much simpler to dispose of this matter at this early point at far less expense to itself than by going through formal litigation.

10. An examination before trial now would certainly make matters easier for respondent and definitely for your deponent's attorney.

11. Your deponent has been advised by his attorney that Rule 3102(C) provides for such procedures and your deponent asks that the court make an appropriate order granting the relief requested.

(s) Michael L. Brown

Sworn to before me
May , 1984

At the Special Term of the Supreme Court (Case 7) held at the Hall of Justice, Rochester, New York on June 12, 1984.

STATE OF NEW YORK SUPREME COURT

COUNTY OF MONROE

Index No. 2652/84

MICHAEL L. BROWN - - - - - *Petitioner,*
62 Cumming Street
Rochester, New York 14609

v.

KENTUCKY FRIED CHICKEN - - - *Respondent.*

PETITIONER having moved this court for an order pursuant to Rule 3102(c) of the CPLR for an order granting him an examination before trial, in advance of filing a complaint, a person whose testimony would bind respondent with respect to petitioner's termination and after reading the affidavit of Michael L. Brown verified May 21, 1984 and upon the proof of personal service upon the respondent and the respondent being in default for want of an appearance or an answer it is

Now on motion of Alfred P. Kremer, attorney for the petitioner, it is

ORDERED that within thirty days of the service of a certified true entered copy upon Kentucky Fried Chicken, the respondent herein, that you, the Kentucky Fried Chicken shall make available to petitioner's attorney, Alfred P. Kremer, One Exchange Street, Rochester, New York, a person whose testimony will bind the company with respect to the employment of Michael L. Brown from January 3, 1982 to September 21, 1983 and that person is directed to bring with him or her plaintiff's personnel file

containing copies of any papers or document signed by either of the parties pertaining to the terms of Michael L. Brown's employment along with copies of all employment manuals and personnel rules for hiring and terminating individuals in effect from January 3, 1982 to September 21, 1983.

Dated: Rochester, New York
June 25, 1984

(s) Reuben K. Daniels
J.S.C.

84-1268

Office - Supreme Court, U.S.
FILED
MAR 8 1985
No. 84-1268
CLERK

In The

Supreme Court of the United States

October Term, 1984

KFC NATIONAL MANAGEMENT COMPANY,

Petitioner,

vs.

MICHAEL L. BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MICHAEL L. BROWN IN OPPOSITION

ALFRED P. KREMER
Attorney for Respondent
Office and Post Office Address
One Exchange Street, Suite 900
Rochester, New York 14614
Telephone: (716) 546-6040

Daily Record Corporation
Rochester, New York

(11392)

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QUESTION PRESENTED

1.) Since two courts below have found that the remand order was made within the ambit of 28 USC 1447 (C) does this Court have the power to review it despite petitioner's claims that the remand was outside the parameters of the statute?

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In The

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vs.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MICHAEL L. BROWN IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1A) is unreported. The opinion of the United States District Court (Pet. App. 3A) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals was entered 12/15/84. The jurisdiction of this court is presumably envoked pursuant to 28 USC 1254 (1).

STATEMENT

On January 11, 1984 Michael L. Brown demanded that respondent furnish him copies of his employee's application so that he could determine whether or not a contract had been made between himself and respondent in accordance with New York State Law. That request went unanswered. In May, 1984, Michael L. Brown moved in New York State Supreme Court for pre-complaint discovery (Pet. App. 10A) stating among other things that it would help to resolve the issues much more quickly and perhaps dispose of the matter without formal litigation.

A copy of the application was served upon respondent. Respondent defaulted for want of appearance and the New York State Court order was made and entered and served upon petitioner, all of which it concedes. Petitioner then went to the United States District Court arguing that it was now subject to New York State Court Orders and that this was an initial pleading. The district judge ruled otherwise and remanded whatever there was to remand back to the New York State Supreme Court.

The United States Court of Appeals for the Second Circuit factually decided that the remand order made by the district judge was based upon grounds set out in 28 USC 1447 (C) and decided that as a consequence it could not reach the propriety of the district judge's order.

ARGUMENT

REASONS FOR DENYING THE WRIT

Petitioner concedes, sub silentio, that it has not merely failed but it has refused to obey a lawful state court order which was obtained upon its default after notice. It advances no reason for this procedure.

Petitioner's goal and the real reason why it seeks certiorari, is to permit it to avoid the consequences of an order which by law it must otherwise obey.

With that as its major premise, petitioner occupies this Court's time with arguments ill suited for a state circuit court let alone the United States Supreme Court.

Both the United States District Judge and the United States Circuit Judges found that the remand was clearly based upon grounds set out in 28 USC §1447 (C).

Two courts have made a factual finding that the remand was within the parameters of law provided for this event. At a bare minimum, the very narrow issue which petitioner wants resolved is beyond this court on these grounds alone.

Beyond the two court rule, this court has clearly stated in *Thermtron Products, Inc., vs. Hermansdorfer,* 423 US 336, 96 S.Ct. 584, 46 L.Ed. 2d 542 (1976), and *Volvo Corp. of America vs. Schwarzer,* 429 US 1331, 97 S.Ct. 284, 50 L.Ed. 2d 273 (1976), that Congress has immunized from all forms of appellate review any remand order issued within the ambit of 1447 (C) even if an appellate court might deem it erroneous.

Petitioner, eager for any result better than the one it has now, does not tell this court why it should overturn this recently settled principal.

Petitioner makes no showing that any constitutional right of its has been violated; petitioner makes no showing that there is any conflict in the circuits. By way of justification for its position petitioner argues first that the district judge "dismissed," (pet. p25) the case. Since there was no "pre-existing state court action," there was no place to which petitioner could be sent back. As a consequence petitioner argues that there is a judicial black hole which the more powerful jurisdiction of the United States Court system can be envoked to protect petitioner. This is an incorrect description of what happened.

By definition, there was no initial pleading and no state action. Consequently, there was nothing to be removed and nothing to be remanded. Respondent is left where he was before enforcing

an order granting prepleading discovery. Petitioner is left where it was before in disobedience of a lawful order made by a coordinate jurisdiction.

All of this creates no question of national importance; there is no issue of constitutional magnitude. There is no error for this court to correct. There are no questions of equity or manifest injustice. The writ should be denied.

Respectfully submitted,

ALFRED P. KREMER
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Telephone: (716) 546-6040